Enforceability of Hyperlinked Electronic Contracts in Malaysia

Foong Cheng Leong,[*] *Mira Marie Wong and Nur Faiqah Nadhra*[**]

It goes without saying that our court these days accepts electronic contracts as valid and binding on parties without having them being printed and signed manually in hard copy by the parties. Stamping of many agreements by the Stamp Duty Office is now done electronically without the need to submit a hard copy of the same. In fact, there are cases where contracts were formed through the exchange of instant messages.[1]

The general approach adopted by a court in determining whether there is a contract concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. The court may look into the documents relied on as constituting the contract and see whether on their true construction there is to be found in them a contractual offer and acceptance.[2]

In addition, instead of electronic agreements being sent across through emails or instant messaging applications, it is relatively commonplace for businesses to point their contracting partners to the terms contained on a website, i.e. through a hyperlink.

We can see these in application forms, emails, and even in physical or electronic contracts. With the frequent lockdowns due to the COVID-19 pandemic, businesses have adopted electronic contracts, particularly using hyperlinked contracts or terms, rather than physical contracts.

It creates convenience; not only are they great for easy drafting, it makes editing documents a breeze. It is an attempt to achieve a much more friendly and acceptable clientele experience within each business.

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[*] Foong Cheng Leong is an Advocate & Solicitor of the High Court of Malaya. He is the author of *Foong's Malaysia Cyber, Electronic Evidence and Information Technology Law*, published by Thomson Reuters.

[**] Mira Marie Wong and Nur Faiqah Nadhra are students from the University of Liverpool and International Islamic University Malaysia respectively. Both of them were former interns of the firm of Foong Cheng Leong & Co.

1 *Lim Choon Hau v Simpson Wong* [2019] 1 LNS 217, HC; *Shamsudin bin Mohd Yusof v Suhaila binti Sulaiman* [2017] AMEJ 1816; [2017] MLJU 2236, HC. *In & On ID Sdn Bhd v LYC Mother & Child Centre Sdn Bhd* [2020] 8 AMR 793, HC.

2 *Eckhardt Marine GMBH v Sheriff Mahkamah Tinggi Malaya Di Seremban & 2 Ors* [2001] 4 AMR 4233; [2001] 3 CLJ 864, CA.

However, there are certain issues to be looked at when adopting the use of hyperlinked contracts or terms. One of such situations would be where the contracting parties each have their own terms of engagement with reference to their own hyperlinked contracts or terms. Without a signed contract, this poses a dilemma as to which contract or terms would apply.

This article addresses the measures businesses may use to incorporate a hyperlink successfully and the current state of law in disputes involving contracts or terms incorporated by reference by way of a hyperlink. Therefore, we will look into the cases below to see how the courts have dealt with such a dilemma.

English law position

In tackling the issue whether electronic terms and conditions form part of an agreement, the English courts critically analysed whether a party had taken reasonable steps to ensure that its terms and conditions were brought to the attention of the other side. The two following courts had based their focus on the conspicuousness of the terms.

In *Impala Warehousing v Wanxiang Resources*,[3] Impala issued a warehousing certificate in respect of Wanxiang's goods pledged to a bank as security. The warehouse certificate was then endorsed to Wanxiang after the sum advanced by the bank had been paid off. A dispute arose thereafter and the parties disagreed where the matter ought to be adjudicated. The back of the warehousing certificate contained a term stating that the latest version of its terms and conditions are posted on its official website. The website contains an agreement stating that, among others, the governing law of the matter is English law and the English court shall have exclusive jurisdiction to adjudicate the matter.

In deciding whether the English court has exclusive jurisdiction, the English High Court held that as a matter of English law where terms are incorporated it must be shown that the party seeking to rely on the conditions has done what is reasonably sufficient to give the other party notice of the conditions. The learned judge found that the first page of the warehouse certificate contains a clause stating that all disputes shall be subject to Impala's terms and conditions. At the base of the page, the reader is invited to refer to the reverse of the page for additional conditions. On the reverse, the reader is referred to Impala's website for its terms and conditions.

Thus, the holder of the warehouse certificate knows that the certificate is subject to Impala's terms and conditions. The High Court held that these steps taken by Impala were reasonably sufficient to give the holder notice of the conditions. In this day and age when standard terms are frequently to be

[3] [2015] EWHC 25.

found on websites, the High Court considered that reference to the website is sufficient incorporation of the warehousing terms found on the website.

Cockett Marine Oil DMCC v Ing Bank NV & Anor,[4] on the other hand, involved a challenge of two arbitration awards on the ground that the arbitral tribunal had no jurisdiction. The tribunal held that it had jurisdiction because the terms of the contract between the parties included a London arbitration clause. The claimants had agreed to purchase bunkers from the defendants in two separate transactions. The defendants, being the sellers, had earlier sent a mass email to their customers enclosing their terms and conditions which contained the London arbitration clause which provides for the jurisdiction of the arbitral tribunal in London in the event of a dispute. The parties had a dispute and the defendants brought the matter to arbitration.

One of the two transactions was done through an exchange of emails. The defendant sent a copy of its sales order confirmation which contained the particulars of the sale and purchase. The email also stated that "… The fixed terms and conditions are well known to you and remain in your possession. If this is not the case, the terms can be found under the web address [to the defendant's terms and conditions]".

The English High Court held that the defendants' terms and conditions apply to the contract for the supply of bunkers and therefore the arbitral tribunal has jurisdiction. The High Court found that the claimants were aware of the defendants' terms and conditions since the defendants had taken steps to inform their customers, including the claimants, regarding the defendants' terms and conditions by way of the said mass email. In respect of the transaction involving the email exchange and sales confirmation order, the High Court further held that the claimant could access the defendants' terms and conditions by clicking on the hyperlink in the sales order confirmation.

Malaysian law position

Our court's approach in assessing whether the hyperlinked contract or terms are considered incorporated is similar to the English court's position. Essentially, there must be a clear and concise notice informing the reader that the hyperlinked contract or terms apply. Therefore, parties who wish to rely on their hyperlinked contract or terms to be incorporated must ensure that they provide an avenue for the user to read the terms of the agreement. Simply inserting a hyperlink to the terms and conditions may not be effective in making them form part of the overall contract. The following recent court decisions have highlighted the thorny issues of the enforceability of hyperlinked agreements in businesses, i.e. whether or not they could be incorporated by reference.

[4] [2019] EWHC 1533.

In *Able Food Sdn Bhd v Open Country Dairy Ltd*,[5] the plaintiff, a Malaysian company, sued the defendant, a New Zealand company, for alleged breach of contract(s) in, among others, supplying instant whole milk powder of unmerchantable quality. The plaintiff demanded, among others, special damages and general damages for loss of profit and loss of market.

The defendant challenged the jurisdiction of the High Court in Malaysia to hear the dispute on the ground that the parties had submitted to the exclusive jurisdiction of the courts in New Zealand. In this regard, the parties had entered into seven sales contracts. Each of the sales contracts (except for one) contains an endorsement with a hyperlink to its terms of trade ("Terms of Trade") and it reads as follows:

> http://opencountry.co.nz/termsoftrade
>
> The Terms of Trade form part of this contract for sale and the parties agree to comply with the Terms of Trade in performing their obligation under this contract. Please be advised that OCD has modified its Terms of Trade please consult the attached terms.

The defendant argued that their "Terms of Trade" were incorporated by reference in each of the sales contracts wherein the parties had agreed that New Zealand law would apply and the parties were subject to the exclusive jurisdiction of the courts in New Zealand (hereinafter referred to as the "choice of law and jurisdiction clauses").

The High Court[6] held that the choice of law and jurisdiction clauses were not incorporated in the contracts because the Terms of Trade were not attached to the sales contracts, among others.

However, on appeal, the Court of Appeal overturned the High Court's decision and held that the choice of law and jurisdiction clauses were, in fact, incorporated into the sales contracts.

In regard to whether the Terms of Trade were incorporated by reference, the court reiterated the following basic principles of the law of contract:

- To incorporate a binding term, reasonable notice must be given either before or at the time the contract was made.[7]
- The terms incorporated should be located in a document where terms are expected to be printed.[8]

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[5] [2021] 2 AMR 246; [2021] 4 CLJ 614, HC; *Open Country Dairy Limited v Able Food Sdn Bhd* [2021] 5 AMR 360; [2021] 7 CLJ 716, CA.

[6] [2021] 2 AMR 246; [2021] 4 CLJ 614, HC.

[7] *Olley v Marlborough Court Hotel* [1949] 1 KB 532, CA.

[8] *Chapelton v Barry Urban District Council* [1940] 1 KB 532, CA.

- Whether or not the parties had read the terms, contractual documents signed by the parties would automatically be considered as binding.[9]
- Reasonable steps must be taken by the party who inserted the term to bring it to the attention of the other party.[10]

The Court of Appeal found that the parties had a course of dealings. In all the sales contracts (issued by the defendant and duly accepted/signed by the plaintiff without any comment, modification, or qualification), it was clearly stated that the Terms of Trade formed part of the contract and that the parties agreed to comply with the Terms of Trade in performing their obligations under the contracts. The endorsement in each of the sales contracts referred to a hyperlink, to wit, "http://opencountry.co.nz/termsoftrade". The Terms of Trade could be found in the hyperlink. The plaintiff, for whatever reason, did not click on or look up the hyperlink. But that did not mean that the Terms of Trade, which were contained in the hyperlink, did not apply.

The Court of Appeal held that the burden was on the plaintiff to look up the Terms of Trade via the hyperlink. The failure on the plaintiff's part to do so was akin to a contracting party not bothering to avail themselves of the terms and to read and understand the same, with the benefit of legal advice or otherwise.

The plaintiff argued that the defendant was under a duty or obligation to furnish them with a copy of the Terms of Trade. The Court of Appeal was of the view that there was no such duty or obligation as the Terms of Trade were, as the defendant put it, just a "click away".

The Court of Appeal found that notice of the Terms of Trade was given at the time when the contract was formed, and it was referred to in a document ("sales contract") that one would reasonably expect to contain contractual terms. The express notice was given to the plaintiff that the sales contracts were subject to the Terms of Trade, which was accessible via a hyperlink provided. There was no ambiguity whatsoever as to where the Terms of Trade were located. Thus, the Court of Appeal was satisfied that the defendant had fulfilled the requirement of having taken reasonable steps to bring the Terms of Trade to the plaintiff's attention and incorporating it in the sales contracts.

Additionally, during the product purchase by the plaintiff, it was apparent that there was an exclusive jurisdiction clause. Therefore, the Malaysian court was obliged to give effect to the exclusive jurisdiction clause unless the plaintiff, as the party seeking to avoid the application of the clause, was able to establish that there were exceptional circumstances to justify the contrary. Since there was no convincing evidence to show that the plaintiff had any

[9] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.
[10] *Parker v South Eastern Railway Company* [1877] 2 CPD 416.

exceptional circumstances to exclude the express choice of jurisdiction, the most appropriate jurisdiction to hear the dispute would be in New Zealand.

The Court of Appeal further stated that although it would seem unfair in the plaintiff's perspective to file the action in New Zealand, however, it was what they had agreed upon when they signed the contract, and so if any inconvenience were to be faced by the plaintiff, it would merely amount to the consequences of their agreement.

In *MISC Bhd v Cockett Marine Oil (Asia) Pte Ltd*,[11] the plaintiff had invited tenders for the supply of bunkers via email and in the email, the plaintiff had attached their proposal form and terms and conditions ("the plaintiff's terms").

In the body of the said email under the heading "Important Note", the plaintiff set out terms and conditions of the purchase attached to the email. The plaintiff's terms stated that the provisions of the agreement shall be subject to, construed, and interpreted in accordance with the laws of Malaysia, and the parties hereto submit to the exclusive jurisdiction of Malaysian courts.

In addition, the plaintiff's terms stated that the plaintiff's terms constitute the entire agreement between the parties and no modification would be effective unless made in writing and signed by both parties.

After a series of emails were exchanged between the parties, the tender was awarded to the defendant. The plaintiff contended that the contract was concluded on the plaintiff's terms when the parties agreed on the price. The defendant, on the other hand, contended that the contract was made on its terms as the defendant's emails carried a hyperlink to the defendant's website containing the Fuel Supply Terms & Conditions ("the defendant's terms") at its footer.

The parties made the necessary arrangements to perform the contract by the defendant supplying bunkers to the plaintiff ("supply contract"). The supply went into trouble when the bunkers were detained by the Malaysian Maritime Enforcement Agency for potential offences. The plaintiff then terminated the supply contract on the grounds that the defendant was in breach of its obligation to deliver the bunkers free of claims and encumbrances.

After the bunkers were released by the Malaysian Maritime Enforcement Agency, the parties' solicitors had commenced negotiation with reference to the plaintiff's terms. The negotiation failed and the plaintiff initiated proceedings against the defendant in the High Court of Malaysia for damages arising from the defendant's alleged breach of contract. The

[11] [2021] AMEJ 0444; [2021] MLJU 563, HC.

defendant, however, commenced arbitration proceedings in London and consequently sought a stay order pursuant to s 10 of the Arbitration Act 2005 and challenged the jurisdiction of Malaysia's High Court. In response, the plaintiff applied for an anti-arbitration injunction on the grounds that the English courts have no jurisdiction over the proceedings based on the terms agreed between both parties in the supply contract.

On the issue of whose terms applied, the High Court held that the parties had contracted on the plaintiff's terms and therefore, the Malaysian court had jurisdiction to adjudicate the matter. Judicial Commissioner Atan Mustaffa held that the plaintiff had attached their terms during their invitation to tender whereby it clearly stated the recipients were invited to tender using the form provided and on the basis that it was the plaintiff's terms that were to apply as found under the heading of "IMPORTANT NOTE". Although the defendant's hyperlink to the defendant's terms was stated in the footer of its emails to the plaintiff during negotiation, there was no indication that the defendant's offer made pursuant to the plaintiff's invitation was a counter-offer to the plaintiff's terms.

In addition, the learned judicial commissioner held that the invitation to tender issued by the plaintiff via email was an offer and capable of immediate acceptance and should not be regarded as a mere invitation to treat apart from the specific price made on the forms. The forms included specified time and place of supply, fuel specifications, and terms and conditions therewith, which were already present in the invitation to tender and was not left open for any further discussion.

The learned judicial commissioner held that the hyperlink to the defendant's terms was not sufficient to be incorporated into the supply contract. There was no step taken by the defendant to draw the attention of the plaintiff to the application of the hyperlink which only appeared at the foot of the defendant's emails. The defendant did not make it plain that the defendant's terms were to govern the supply contract by giving reasonable notice of the conditions in a visually prominent way.

The High Court relied on the English High Court case of *Transformers & Rectifiers Ltd v Needs Ltd*[12] which held that a seller who wishes to incorporate his terms and conditions by referring to the acknowledgement of order must, at the very least, refer to those conditions on the face of the acknowledgement of order in terms that make it plain that they are to govern the contract. In this particular case it was held that if the conditions are not in a form that is in common use in the relevant industry, the seller must give the buyer reasonable notice of the conditions by printing them on the reverse of the acknowledgement of order accompanied by a statement on the face of the acknowledgement of order that it is subject to the conditions on the back.

[12] [2015] EWHC 269.

The High Court also relied on the English High Court case of *Sterling Hydraulics Ltd v Dichtomatic Ltd*[13] which held that adequate notice of the terms must be given if they are to prevent the acknowledgement of an offer made on different terms from resulting in binding contract.

A reference to an inconspicuous hyperlink at the bottom of someone's signature at the footer of the email does not constitute sufficient notice of intention to contract on different terms. The plaintiff as the buyer had already made it plain that its terms and conditions applied and that it gave the plaintiff's terms and conditions to the defendant who responded by quoting the price using the tender document proposal form. Conversely, the defendant did not make specific reference to the defendant's terms and conditions in the proposal form or include the terms to make a counteroffer.

Accordingly, the High Court held that the defendant had failed to demonstrate the existence of an arbitration agreement between the parties.

This case is relevant when dealing with a case concerning the formation of a contract vide correspondences. It is common for businesses to hyperlink a website on their email footers. As rightly decided by the learned judicial commissioner, a party seeking to rely on the conditions must show that sufficient notice of the conditions had been reasonably given to the other party.

Electronic contracts with hyperlinks to further terms and conditions

It is also commonplace to have electronic contracts with hyperlink(s) to additional terms and conditions. Such additional terms and conditions, in practice, are usually the general terms and conditions. It is submitted that such further terms apply to the parties once the contract is agreed upon regardless of whether or not the parties have read them. However, there may be exceptions to this. For example, the links to such additional terms and conditions are defective (e.g. broken link or wrong link).

Businesses dealing with consumers should be aware of the provisions of ss 24C (general procedural unfairness), 24D (general substantive unfairness) and 24G (effect of unfair terms) of the Consumer Protection Act 1999. These provisions provide that where a contract or term of a contract is either procedurally or substantively unfair or both, the court or the Consumer Tribunal may declare the contract or the term of the contract as unenforceable or void.

[13] [2006] EWHC 2004.

Tips when incorporating hyperlinked terms

Businesses may bear the following tips in mind when incorporating hyperlinked terms during the course of negotiations:

1. *Clarity is the key*: Businesses should expressly inform their counterparty that their terms apply and are available on a website. For example, the link is accompanied with a notice stating, "Please click here for our terms and conditions of trade". Businesses should also consider placing the hyperlink at the body of the email. Avoid placing the hyperlink anywhere inconspicuous, such as the footer of the email using very small font size. Also, do ensure that the hyperlink is valid and not broken.

2. *Insert a date on all the contracts*: This is so that the businesses know which version of the terms and conditions they were dealing with in the future.

3. *Keep the terms and conditions up to date*.

4. *Keep a record of previous contracts*: As disputes may arise any time in the future, the contracting parties may not know which contract is applicable if there are various versions of the contract. Such previous contracts may be recorded by way of a print screen. If a business did not make a copy, they have to try to retrieve it using the WayBack Machine www.archive.org/web.

5. *Employ a tracking mechanism in the system*: This could keep track of whether the counterparty had accessed the terms and conditions.

6. *Verify whether the terms reflect what have been agreed by the parties*: In other words, ensure the terms are parallel to what have been discussed or negotiated with the counterparty.

7. *Check the terms thoroughly*: Be extremely attentive to the accuracy and the detail of the terms. Staff should be trained to identify any ambiguous terms that may knock back any rights that you may wish to protect, especially when it involves any onerous provision. The court may hold against a party for not examining the provisions stated in the terms and conditions.

8. *Consider a response procedure*: This is even if the business does not have any enquiries regarding the hyperlinked terms provided by the other party. Such response procedure can be in the following manner:

    (a) Open discussion regarding the contract or terms;

(b) Investigate any problems which may affect their rights;

(c) Review the terms and decide whether the contracted terms should apply.